(18)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

Nos. 911, 912, 913

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, A CORPORATION, AND WABASH RAILROAD COMPANY, A CORPORATION,

Petitioners,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, A CORPORATION; HOLMAN D. PETTIBONE AND L. F. DeRAMUS, TRUSTEES OF CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY; CHICAGO AND WESTERN INDIANA RAILROAD COMPANY, A CORPORATION; AND CHICAGO AND ERIE RAILROAD COMPANY, A CORPORATION,

Respondents.

PETITION OF CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY AND WABASH RAILROAD COMPANY FOR A REHEARING UPON THEIR PETITION FOR CERTIORARI.

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THE BUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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Petitioners, Chicago & Eastern Illinois Railroad Company and Wabash Railroad Company, respectfully petition this Honorable Court to grant a rehearing upon their petition for certiorari, which was denied on May 22, 1944.

Because of the necessity of compressing into so few

pages the voluminous stipulated facts of this case in order to present them concisely to this Court, petitioners believe that their petition for certiorari and supporting brief may not have enabled this Court to appreciate fully the absurd and utterly indefensible situation created by the decision of the Circuit Court of Appeals, and the impact thereof on the parties to this case for the next nine hundred fifty years. Petitioners therefore earnestly ask this Court to review their petition for certiorari and briefs, and to grant the writ.

Notwithstanding the fact that these six railroads in 1902, twenty years after the 1882 Agreement, entered into a new agreement (R. 509-28) and Lease (R. 529-56), and thereafter, during the period from 1917 until 1936, entered into five later joint leases (R. 557-626, 361-62) all containing almost identical provisions and all being inconsistent with those of paragraphs 5th and 6th of the 1882 Agreement (R. 199-200), the effect of the Circuit Court's decision is to revive the provisions of paragraph 6th of the old 1882 Agreement which cover the same subject matter as said provisions of the 1902 Agreement and the six later leases, and to hold controlling such earlier provisions which these parties had thus repeatedly attempted to discard.

It is difficult to conceive how the parties could have given a clearer expression of their intent to discard said provisions of the 1882 Agreement than by their repeated reiteration, in these five instruments under seal, of the pertinent provisions of the 1902 Agreement and the 1902 Lease during the succeeding period of thirty-four years.

The provisions of the new agreement of 1902 were not drafted hastily or ill-advisedly; nor were they idly incorporated. They were entered into only after prolonged negotiations lasting more than a year and a half (R. 803-84), during which the five tenant roads were endeavoring to rearrange their rights and reconcile their different points of

view, and during which negotiations seven drafts, in which the language of the pertinent provisions varied, were prepared and discussed by the parties before the final language was adopted (R. 884-89). This 1902 Agreement (R. 509-528) was the new agreement covering the question of the proper division of Western Indiana expenses, which the parties at the outset of said negotiations unanimously resolved to execute in lieu of all theretofore existing contracts between them (R. 828-32), and it was the foundation of the 1902 Lease.

That these six railroads, from and after 1902, operated in the belief that the pertinent provisions of the 1902 Lease were controlling appears from the stipulated facts which show that on all occasions the parties uniformly referred to its provisions to determine their respective rights and liabilities (R. 320-22, 330-31, 342, 345-46, 348-50). The stipulated facts fail to show a single instance until 1938 (R. 316-357), thirty-six years later, in which any of the parties even intimated that their rights and liabilities as to the issues involved in this case might be still controlled by the 1882 Agreement.

In holding that the provisions of paragraph 6th of the 1882 Agreement are controlling on the questions involved, the Circuit Court has ignored all of the foregoing circumstances and has thereby thwarted the efforts of the parties to abandon and discard said provisions of the 1882 Agreement.

The effect of the decision is that said provisions of the old 1882 Agreement remain unaffected no matter how many subsequent agreements are executed and no matter how inconsistent the provisions thereof may be with those of the 1882 Agreement. The rule of law in Illinois is exactly to the contrary. (*Stow* v. *Russell, et al.*, 36 Ill. 18, 30; *Harrison, et al.* v. *Polar Star Lodge*, 116 Ill. 279, 287; *Lloyd*,

et al. v. *Campbell,* 186 Ill. App. 566, 570-571; *Chicago & W. I. R. R.* v. *Chicago & E. I. R. R. Co.,* 260 Ill. 246.) Instead of holding in accordance with said rule that the 1902 Agreement and the 1902 Lease superseded and abrogated said provisions of the old 1882 Agreement, the Circuit Court has, in effect, made said provisions of the earlier 1882 Agreement nullify and black out the provisions of the later instruments, although such later provisions cover the same subject matter and are inconsistent with those provisions of the 1882 Agreement.

This incongruous situation results from the decision of the Circuit Court based upon the patently erroneous theory originated by that Court after the case had been submitted, which was neither contended for nor justified by any of the respondents. In fact, the position taken in the Circuit Court by the only two respondents who filed an opposing brief in this Court was exactly contrary to the Circuit Court's theory (Supporting Brief, p. 9). In view of these circumstances, the petition for certiorari should be granted under the doctrine of *LeTulle* v. *Scofield,* 308 U. S. 415.

Although petitioners appreciate that the denial of their petition for certiorari does not constitute an affirmance or an approval on the merits by this Court of the Circuit Court's decision, the practical effect of such denial is to make the Circuit Court's decision final, and thus to hold that these six railroads still are and will be for the next nine hundred fifty years controlled by the dead hand of said provisions of the old 1882 Agreement.

The Circuit Court's decision of this case upon an issue not presented or argued by any of the parties has deprived these petitioners of their right to be heard thereon except by petition for rehearing, addressed to the Circuit Court which, having formulated such issue as its own after the case had been submitted and then having decided the case

upon that issue, could not possibly hear that issue with an open mind, as contemplated by our system of judicial procedure. The only opportunity of petitioners for any hearing upon such issue was accordingly presented only after the Circuit Court had become committed to the theory upon which it decided such issue.

If the District Court had based its decree upon some issue or question neither presented to it nor argued by the parties, an opportunity for a full and impartial hearing thereon would be afforded the parties as a matter of right upon appeal to the Circuit Court of Appeals, and thus the requirements of due process of law would be satisfied. In the unusual situation presented in the case at bar, however, the parties had no review as a matter of right, and, if certiorari is not granted, they will have no review at all.

The requirements of due process of law will not be satisfied, therefore, unless this Court grants the petition for certiorari and affords petitioners the opportunity for a review before an impartial tribunal upon this pivotal question originated by the Circuit Court. If this is not done, it can scarcely be said that petitioners have had their day in court on this question. This may well have been the consideration which impelled this Court to grant certiorari in the *LeTulle* case, *supra*, where this Court said (308 U. S. 416):

> "We took this case because the petition for certiorari alleged that the Circuit Court of Appeals had based its decision on a point not presented or argued by the litigants, which the petitioner had never had an opportunity to meet by the production of evidence."

It is our profound conviction that a decision rendered under such circumstances, in a case of this magnitude, should be reviewed by this Court in the exercise of its power of supervision to insure the fair and impartial administration of justice.

Petitioners, therefore, respectfully pray this Honorable Court to grant a rehearing of their petition for certiorari and, upon such rehearing, to grant said petition for certiorari.

Respectfully submitted,

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Petitioner,

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We, the undersigned, counsel for petitioners, do hereby certify that the above and foregoing Petition for Rehearing is presented in good faith and not for delay.

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